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Belgian Legal Journals between 'Pragmatic Laziness' and Political Accommodation*

Introduction

That legal historians are few has quite naturally led to a limited number of views and even to virtual 'monopolies' on certain topics. Legal history differs in this respect from other legal disciplines, which tend to attract a larger number of authors and therefore generate a much larger number of conflicting views and opinions.

During my preparation of materials on the topic of Belgian legal reviews in the nineteenth and twentieth centuries, it struck me that the handful of internationally published authors had taken a rather dim view on the subject: Holthöfer had dismissed Belgian law reviews as mere 'practitioners magazines'¹, whilst Heirbaut deplored the absence of academics in law journals, denounced 'pragmatic laziness' as a national characteristic², and concluded that the law reviews' history was "an example of the failure of the legal scholarship in the country"³.

However, between 1 March 2008 and 1 March 2009, no fewer than 6,000 articles were published in 82 different listed⁴ Belgian law reviews, most of these journals having been established for several decades already. Also, most contributors hold academic positions. Surely not all of these articles could have been rubbish? Not even by the stringent standards of the German *Pandektenwissenschaft*.

Instead of accepting the wholesale dismissal, we propose to contextualise the Belgian law review scene against the backdrop of the intellectual and political eras in which the works were written: it will then become apparent that pragmatism and conformity play a much greater role in the perceived 'failure' than does suspected incompetence.

* This article was published with support from ESF Grant No. 7923.

¹ E. Holthöfer. *Beiträge zur Justizgeschichte der Niederlande, Belgiens und Luxemburgs im 19. und 20. Jahrhundert*. Frankfurt/M 1993, pp. 150–189.

² D. Heirbaut, M. E. Storme. *De Belgische Rechtstraditie: Van een lang zoeken naar onafhankelijkheid naar een verlangen naar afhankelijkheid*. Belgisch rapport voor het XVIIe Internationaal Congres voor rechtsvergelijking. – *Tijdschrift voor privaatrecht* 2008, pp. 979–1041 (page 26 of the PDF version).

³ D. Heirbaut. *Law Reviews in Belgium (1763–2004): Instruments of legal practice and linguistic conflicts*. – *Juristische Zeitschriften in Europa*. M. Stolleis, T. Simon (eds.). Frankfurt/M 2006, p. 367.

⁴ *Recueil permanent des revues juridiques (R.P.R.J.) / Permanent overzicht van juridische tijdschriften (P.O.J.T.)*.

Within the constraints of this article, including an upper limit of 10 pages, my account cannot possibly hope to be complete, or even have the beginning of completeness to show for its efforts, which is why I have given ample attention to notes and suggestions for further reading.

The French and Dutch years

When the Southern Netherlands were transferred from the Spanish to the Austrian Habsburgs in 1714, the various towns and regions retained their various legal systems based on custom. The Austrian rule of the day meant modernisation in different fields—e.g., the abolishment of judicial torture—but it was not until 1787 that Emperor Joseph II decreed the replacement of the multitude of provincial councils and law courts by a centralised executive and new judicial institutions.⁵ This attack on old liberties led to a series of protests and uprisings⁶ that were barely contained by the time French revolutionaries invaded the country in 1792 and 1794, having it officially annexed on 1 October 1795.

Hegel famously described Napoleon as 'reason on horseback', and the newly incorporated departments of France indeed got a speedy introduction to the mixed blessings of the French occupation: the Code Merlin abolished all existing legislation and replaced it with the laws of the French Republic, characterised by economic liberalism⁷, secularism, centralisation, codification⁸, and—last but not least—the introduction of French as the judicial language.

The impact of the French period was to be profound and the reception of the new legal system thorough and permanent.⁹ The logical explanation seems to be that, a certain political opposition notwithstanding, a majority in the legal profession saw the French import as a suitable tool for modern times, far superior in this respect to the idiosyncrasies of the Old Patriotic Law.¹⁰ In addition, of course, the years 1795–1815 saw the emergence of a new legal elite who saw and seized new career opportunities in the unified empire.¹¹

The French years did not yield much legal literature, but as early as 1807, 'noteworthy' decisions of the Brussels Court of Appeal started to be published on a regular basis, followed the next year by a similar initiative regarding industrial Liège's important Court of Appeal.¹²

Between 1815 and 1830, the Southern and Northern Netherlands were briefly reunited under King William I, but French legislation, centred on its five voluminous codes, remained in force.¹³

Not unlike the French period, the Dutch period was characterised by an amazing amount of accommodation by the legal professions, who were all too happy to stay in office. In fact, much of the legislative work in the United Kingdom of the Netherlands was undertaken by jurisconsults from the South and the working language of the reform commission was French.

Nonetheless, the legal profession proved ready to switch loyalties again after the sudden Belgian independence had surprised everybody. Loyal magistrates appointed by the Dutch king turned into stern anti-Orangists

⁵ P. Arblaster. *A History of the Low Countries*. New York 2006, p. 171.

⁶ The States of Brabant proclaimed their independence on 31 December 1789. They were joined by all other provinces but one and formed the short-lived United States of Belgium.

⁷ The Law Le Chapelier of 14–17 June 1791 declared all corporations and guilds void and forbade any impediment to free enterprise. The *Décret d'Allarde* of 2–17 March 1791 had already introduced the principle of free choice of trade. Even today, this law is often invoked against bureaucratic interference.

⁸ These five are: *Code Civil* 1804, *Code de procédure civile* 1806, *Code du Commerce* 1807, *Code d'instruction criminelle* 1810 and *Code pénal* 1810.

⁹ P. Godding. *De l'ancien droit Belgique' au Code civil de 1804: une rupture?* – A. Wijffels (ed.). *Le Code civil entre ius commune et droit privé européen*. Brussel, Bruylant 2005, pp. 585–610; F. Stevens. *Het Franse régime: oorsprong van onze democratische rechtsstaat? – Handelingen van het Genootschap voor geschiedenis, gesticht onder de benaming Société d'émulation te Brugge*. Brugge 1998, pp. 135, 143–148.

¹⁰ In the words of Ernst Holthöfer: "Die Rationalisierung des Justizwesens durch Schaffung einer einheitlichen, in drei Instanzen gegliederten staatlichen Gerichtsbarkeit mit einer Rechtsbeschwerdeinstanz an der Spitze gehört zu den epochalen Leistungen der französischen Gesetzgebung im Gefolge der grossen Revolution" (E. Holthöfer (Note 1), p. 9).

¹¹ Lawyers from the Southern Netherlands were not only appointed judges in their native country but often in Holland, France proper and the occupied Rhine Land as well. See P. Van Hille. *Het Hof van beroep te Brussel en de Rechtbanken van Eerste Aanleg in Oost- en West-Vlaanderen onder het Nederlandse Bewind en sinds de Omwenteling van 1830 tot 4 oktober 1832*. Tiel 1981, p. 7.

¹² *Décisions notables du Tribunal d'Appel/de la Cour d'Appel de Bruxelles (1807–1813); Recueil des Arrêts de la Cour d'Appel de Liège (1808–1839)*. As their titles indicate, these were simple listings of jurisprudence.

¹³ An odd exception being the metric system that was abolished in 1815 but re-introduced in 1821. In terms of new legislation the show-piece was the Law of 25 December 1825 on superficies and leasehold (*Loi sur la superficie et l'emphythéose*).

overnight, calling upon the new Provisional Government “to protect the fatherland against the vile agitators”¹⁴, by which not the insurgents but the Dutch were meant.

Van Hille recalls how only months before it turned pro-Belgian, the Court of Appeal in Liège had sent a slavish letter of adherence to the Dutch king and one absentee judge had made every effort to express his *post factum* agreement with the letter he had been unable to sign due to illness.¹⁵

As might be expected, the appointment of 400 new judges by the Belgian Provisional Government did not harm that government’s popularity amongst lawyers. Moreover, these nominations were entirely politicised and carefully reflected the bourgeois balance of power between Catholics and liberals, thereby keeping everybody happy.¹⁶

Independence and the question of a national legal system

With Belgian independence, the new state had three legislative options: to retain the existing Franco-Dutch legislation, to revert to the pre-revolutionary laws, and to draft entirely new legislation. Rhetoric notwithstanding¹⁷, the French system remained in place and no new legislation was introduced, with the exception of a much lauded, very liberal constitution in 1831.¹⁸

Many explanations have been offered for this choice, but the most important one seems to have been pragmatism: since 1795, a whole generation of lawyers had been studying and practising the French laws that moreover seemed better suited to the needs of business and commerce.

From a doctrinal point of view as well, the decision was understandable: one simply had to ‘get on with business’ and easy access to the French original sources and commentaries was readily available.¹⁹ Moreover, the absence of copyright laws until 1852 allowed for inexpensive pirated editions.²⁰

As a result, in the first years of independence there were no Belgian publications to speak of and one relied on French commentaries and magazines instead.²¹ As for the overviews of jurisprudence, a few local judgements might sometimes be added as a supplement to the French-language main pages.

But even after the early years of independence, no national legal tradition was created, although, politically, Belgium lived up to its treaty promises of eternal neutrality²² and incessantly reiterated its sovereignty vis-à-vis a dominating southern neighbour.²³

Here again, the explanation might be pragmatic: society and business simply had no need for new codification, and the existing laws continued to serve their purpose well. The proof of this attitude lies in the fact that when an update was due, new laws were indeed passed (e.g., the Law on Mortgages and Securities 1857 and the Criminal Code 1867). However, François Laurent’s 1885 project of revision of the civil code, encompassing 2,441 articles, was never enacted.

¹⁴ Speech of First Advocate-General Petitjean at the opening session of the Brussels Court of Appeal on 25 October 1830 (quoted by Luc Burgelman, *Geschiedenis van de Belgische Magistratuur (1830–2002)*. – D. Heirbaut, X. Rousseaux, K. Velle. *Politieke en sociale geschiedenis van justitie in België van 1830 tot heden*, Brugge 2004, pp. 187–216). In Ghent however, the attorney Hippolyte Metdepenningen (1799–1881) rallied a strong Orangist movement around him for several decades (!) to come.

¹⁵ P. Van Hille (Note 11), p. 21.

¹⁶ L. Burgelman (Note 14), p. 190.

¹⁷ D. Heirbaut. *Hadden/hebben de Belgische ministers van justitie een civielrechtelijk beleid?* Thorbecke Lezing Leiden. Mechelen 2005.

¹⁸ E. Holthöfer (Note 1), p. 147; J. Gilissen. *Die belgische Verfassung von 1831. Ihr Ursprung und ihr Einfluss*. – W. Conze (Hrsg.). *Beiträge zur deutschen und belgischen Verfassungsgeschichte im 19. Jahrhundert*. – Stuttgart 1967, pp. 38–69.

¹⁹ Language was not a barrier either: until about a generation ago, an educated Fleming would be *ipso facto* fluent in French. Also, the upper-class and aristocracy (the traditional recruitment grounds for the legal profession) had been predominantly francophone since the late Middle Ages.

²⁰ D. Heirbaut (Note 3), p. 345.

²¹ Popular French imports were *Recueil Dalloz-Sirey*, since 1845, and the *Gazette des Tribunaux*, 1826–1912. The Dutch counterpart, *Rechtsgeleerd Magazijn Themis*, since 1839 was never that popular.

²² Article 5, Conference Protocol No. XVI of 20 January 1831: “La Belgique formera un état perpétuellement neutre.” This paragraph was later enshrined in the London Treaties of 1831 and 1839 and complemented by a guarantee-clause by the five big powers. When the German Army marched into Belgium on 4 August 1914, Britain famously declared war over this breach of Belgium’s neutrality.

²³ F. Stevens. *Histoire du droit et nationalisme en Belgique au XIXe siècle*. – J. Poumarède. *Histoire de l’histoire du droit*. Toulouse 2006, pp. 211–213.

According to Heirbaut and Storme, this absence of a more all-encompassing national project was essentially motivated by 'pragmatic laziness, possibly the typical feature of Belgian law'.²⁴

The nineteenth century nonetheless saw the creation of a large number of magazines, some of which have survived to this day.²⁵ Virtually all of these were specialised on the basis of location or theme. These reviews concentrated heavily on jurisprudence and revealed a 'fetishism of the written law'²⁶ that was typical of the predominant exegetical school of interpretation. The best-known was *La Belgique judiciaire* (carrying the programmatic subtitle 'Gazette des tribunaux belges et étrangers'), published between 1842 and 1940.²⁷

In 1882, the prolific writer Edmond Picard and three befriended who were attorneys founded the *Journal des Tribunaux*, abbreviated 'JT'. At the outset, it was meant as a tool for dialogue with the public at large and therefore was published on four pages in newspaper format and sold at newspaper stalls throughout the city.

Whilst the JT and other francophone periodicals were often sympathetic to progressive causes such as legal aid; one man, one vote; and workers' emancipation²⁸, there was less understanding of the Flemish demands for equality and the use of Dutch in judicial matters.²⁹ The result of this lack of support would be that the JT and others eventually ended up being the magazines of francophone Belgium rather than of the entire country.

The JT and other reviews did not limit themselves to the publication of judgements and the announcements of forthcoming events but also provided scholarly articles, even if in smaller numbers. The reason for this is easy to see: 1830–1914 was a time of remarkable legislative stability and, at the same time, the medium of choice in the nineteenth century was the monograph or the encyclopaedia³⁰ rather than the academic paper, not least because of the contemporary technology still necessitating intense interaction between publisher, printer, and author, as well as personal visits to libraries.

For the sake of completeness, it should also be mentioned that when Belgium took over the Congo Free State from King Leopold II in 1908, it installed a colonial administration and judiciary that, of course, needed its own law reviews: *La Revue Juridique du Congo belge* (1924–1960), *Le Bulletin des Juridictions Indigènes et du Droit Coutumier* (1933–1962), and *Le Journal des Tribunaux d'Outre-Mer* (1949–1961).

It need not be emphasised that these reviews were hardly a platform for militant reform or de-colonisation. They did, however, concern themselves with the subtleties of nationality and racial segregation in the Congo.³¹

²⁴ D. Heirbaut, M. E. Storme (Note 2), pp. 979–1041.

²⁵ *Inter alii*, Pasicrisie belge, 1832–; Bulletin des arrêts de la Cour de Cassation, 1832–2000; Journal de Procédure, Bruxelles, 1848–1919; Journal des tribunaux, Bruxelles, 1881–1939, 1944–; Jurisprudence Commerciale de Belgique / Belgische Rechtspraak in Handelszaken, 1903–; Jurisprudence Commerciale des Flandres, 1886–1939; Pandectes périodiques, 1888–1939; Rechtskundig Tijdschrift voor België, 1898–1946, 1949–1963; Rechtspraak van de Haven van Antwerpen/Jurisprudence du Port d'Anvers, 1856–; Recueil Général de l'Enregistrement et du Notariat, 1848–; Revue belge de la Police administrative et judiciaire, 1880–1939; Revue de Droit international et de Législation comparée, 1869–1939; Revue du Travail, Bruxelles, 1896–1980.

²⁶ F. GénY. Méthode d'Interprétation et sources en droit privé positif. Paris 1899; J. Bonnetcase. L'école de l'exégèse en droit civil. Paris 1924. The standard work on the (Belgian) exegetical school is B. Bouckaert. De exegetische school. Een kritische studie van de rechtsbronnen- en interpretatieleer bij de 19e eeuwse commentatoren van de Code civil. Antwerpen 1981.

²⁷ An exhaustive survey can be found in Holthöfer (Note 1).

²⁸ B. Coppein. Edmond Picard, actor and witness of the socialization of law in Belgium at the end of the 19th century. – S. Hornyák, B. Juhász, K. Delacasse, Z. Peres (eds.). Turning Points and Breaklines. München 2009, pp. 151–166; B. Coppein. J'ai vu ce que vous n'avez pas vu. Droit et politique dans la pensée juridique d'Edmond Picard (1836–1924). Partie I. – Journal des tribunaux 2007, 126 (6250), pp. 21–23; B. Coppein. Le droit qu'une partie de la nation n'a pas. Edmond Picard en de vermaatschappelijking van het recht in België tijdens het fin de siècle. Belgisch tijdschrift voor filologie en geschiedenis 2008, 86 (2), pp. 375–409; L. Van Bunnan. Le Journal des Tribunaux 125 ans. – Conférence du Jeune Barreau de Bruxelles, nr. 4, 2007, p. 21, available at www.cjbb.be; B. Coppein. Un appareil concasseur et triturateur. De kritiek van Edmond Picard op de wetgevende macht in België tijdens de tweede helft van de 19de eeuw. – Pro memorie: bijdragen tot de rechtsgeschiedenis der Nederlanden 2007, 9 (1), pp. 91–110.

²⁹ Oddly enough, the JT did support the Boers' struggle against the British. L. Van Bunnan (Note 28), p. 22.

³⁰ The popular Pandectes belges aka the Répertoire général de législation, doctrine et jurisprudence belges were published in 151 volumes between 1878 and 1933 and comprised over 7,000 subjects. Its initiator and main author was the omnipresent Edmond Picard. The series was later continued by *Les Nouvelles*.

³¹ T. De Meester. Nationaliteit in Belgisch Congo: Tussen constructie en verbeelding. – Afrika Focus, Vol.; 14, No. 1, 1998, pp. 7–16; A. Sohier. La nationalité des Congolais. – Journal des tribunaux d'outre-mer 1950, p. 49.

The Flemish emancipation and the post-war period

The Flemish emancipation of the past century is nowhere more visible than in the legal profession. The *Bond der Vlaamse Rechtsgeleerden* was founded in 1885, at a moment when administration, universities, and the judiciary all made virtually exclusive use of French, even in the Dutch-speaking areas.^{*32}

As soon as the right to plead in Dutch was secured, the focus of the *Bond* shifted toward the promotion of science in Dutch through the organisation of conferences and the publishing of the *Rechtskundig Tijdschrift voor België* (1897–1946), whose main *raison d'être* was the *Bond's* existence.

In 1931, the *Rechtskundig Weekblad* (or simply 'R.W.') achieved instant success due to the changing political climate and, according to Heirbaut, "a clever collaboration with the Flemish bar organisations and a good understanding of practitioners'" needs.^{*33} The wartime tribulations of the Flemish movement and its periodicals have been addressed exhaustively elsewhere and are too extensive a subject to be treated here.

Over time, the Flemish periodicals multiplied to such a point that today they far outnumber their francophone counterparts, if only because of the larger number of Flemish attorneys (roughly 9,000 in contrast to 6,000), law professors, and judges. As acute language tensions eased over the years, these reviews have lost much of their former political drive and have started to focus instead on the same technical-legal matters that law journals worldwide are concerned with.^{*34}

According to Heirbaut^{*35}, the disappearance of a common law review for the entire country signifies that minds are drifting apart because lawyers are being increasingly locked up in publications in their own language. Also, he says, the Flemish part of the legal profession is starting to seek inspiration from the Netherlands and the francophone part from France.

We believe that the first assertion is too bold and the second unsubstantiated. It is, of course, correct that with universities, most ministries, and the bar organisations now operating monolingually, a great many occasions for meeting and exchanging views have disappeared. However, as long as Belgium has but one Ministry of Justice and a unitary judicial apparatus^{*36}, there is little fear of discrepancies and insularity simply because one still has to take 'the other side' into account.

Though perhaps less than before, universities and bar organisations still organise joint conferences. The different senates of the *Cour de Cassation / Hof van Cassatie and Conseil d'Etat / Raad van State* still hold plenary sessions^{*37}; the Constitutional Court has but one, mixed senate; all major law firms cover the entire country and attract talent from either language group; and, last but not least, a great many of the more prestigious magazines are bilingual and publish doctrine and cases in both languages.^{*38}

The validity of the second allegation—the alleged inspiration from and collaboration with the Netherlands—should not be overestimated either. This pattern may indeed be found in meta-disciplines such as the philosophy of law or legal history, but only very few Dutch elements have been implemented in Belgian positive law (e.g., mediation and certification of shares). Given the divergence between the German and French civil-law traditions, this can hardly come as a surprise.

The main foreign influence is European Union law, which now accounts for 80% of all new legislation. A striking feature of Belgian politics and the legal world alike is the near-total euophilia of all legal actors, not in the least the *Cour de Cassation / Hof van Cassatie*, which conferred a radically supreme position to EEC law in 1971.^{*39} In the words of M. E. Storme and D. Heirbaut:

"There are no constitutional barriers which prevent the country from bartering away its national sovereignty and democracy, and international law has been accepted not only as being an integral part of domestic law, but also—on the basis of false arguments—as being capable of overriding domestic

³² The first language law in judicial matters dates from 1873. Full equality was achieved in 1898 and the language law of 15 June 1935 (still in force) stated that the local language determined the language of the court procedures, with special provisions for bilingual areas. The Dutchification of Ghent University dates back to 1930, the constitution was not officially translated until 1967.

³³ D. Heirbaut (Note 3), p. 359.

³⁴ G. Van Overwalle. *Het Nederlandstalig juridisch tijdschrift in België. – Vlaams jurist vandaag 1988/4*, 20.

³⁵ D. Heirbaut (Note 3), p. 366; D. Heirbaut, M. E. Storme (Note 2), p. 20 (Note 120).

³⁶ Although the Ministry of Justice remains federal, a great many legislations are now entirely decided at the level of the regions and communities (e.g., the zoning law, environmental policy, education, etc.), which of course creates divergence over time: in terms of inheritance tax, it can make a serious difference where one dies.

³⁷ It is, however, correct that the different senates of the *Cour de Cassation, Conseil d'Etat* start to show minor divergencies, e.g., the legal standing of interest groups.

³⁸ E.g., *Procesrecht & Bewijs/Droit judiciaire & Preuve; Tijdschrift voor Belgisch Burgerlijk Recht/Revue du droit civil belge; Tijdschrift voor Sociaal Recht/Revue de droit social; Droit des affaires/Ondernemingsrecht; Tijdschrift voor Handelsrecht/Revue de droit commercial.*

³⁹ Cass., 27 May 1971, *Fromagerie Franco-Suisse Le Ski*, Arr. Cass. 1971, 959, concl. Procureur-Generaal W. Ganshof Van Der Meersch; Pas. 1971 I, 886.

law. In addition, the Cour de Cassation/Hof van cassatie uses the supremacy of international law as a pretext for violating its statutory obligation to consult the Constitutional Court where statutes are alleged to be contrary to the constitution. International law has therefore served as an alibi for upholding political decisions and depriving citizens of constitutional guarantees which protect them against such decisions.⁴⁰

Indeed, the silence of Belgian jurisconsults vis-à-vis the unification process itself, the manifest shortcomings of the European Union decision-making process, and the numerous 'glitches' in legality (e.g., the implementation of policies prior to the ratification of the Lisbon Treaty, the questionable legal foundation of certain policies, and the European Court of Justice's so-called judicial activism (Rasmussen) is deafening. A lonely exception was the implementation of the European Arrest Warrant⁴¹, which drew much criticism, in more than 60 articles, both in Flemish and in francophone publications.⁴²

Conclusions

Our brief overview permits a number of observations:

By addressing recent legislation and noteworthy judgements, Belgian law reviews have been mainly concerned with the needs of the practitioner. This is not to say that there has been no doctrinal reflection, or attempts at theorising—giants such as De Page, Dekkers, and Picard probably could not have been superficial if they wanted to—but this was predominantly done in monographs rather than in reviews, which were more limited in scope. The shift in academic emphasis toward papers and articles is as recent as the ranking-mania of journals.

Secondly, the subject matter of law is intrinsically bound up with the practice of jurisprudence and legislation. It is therefore unavoidable that law reviews concern themselves with what is going on in these fields. Ideally of course, there are systematisation, exegesis, and reflection as well, but the prime task of a positive law review remains to inform the audience of what is going on. In conformity with the French adage that a great lawyer is a great *arrétiste* or annotator of judgements, the Belgian law reviews have done splendidly over time: virtually every field of law is covered by at least one specialist review (usually one in either language).

Thirdly, it would be wrong to assume that there has never been a critical element in the law reviews. That would be totally unsubstantiated, in fact, as a great many themes in society (women's right to vote, anti-discrimination, the right to strike, Europeanisation or judicial reform, etc.) have found their first echoes in legal journals, and vice versa.

It is, however, correct to state that the legal profession is generally conformist to the prevailing ideology, and Belgium is no exception here.⁴³ To a certain extent, conformism has been a hallmark of Belgian doctrine, even if only to a certain extent.

The element of conformism has been clear in its uncritical accommodation of the new regimes (French, Dutch, Belgian, Nazi, or European), but in this the legal profession and the legal journals have merely been a reflection of the population at large. A specific ground for conformity might have been the so-called *Gesetz des Wiedersehens* in a small, closed community⁴⁴. This condition might have been enhanced by the paucity and biographical intertwinement of the number of people involved in the process of judicial decision-making (it was not uncommon for a bourgeois or aristocratic family to turn out prominent judges, legislators, professors, and attorneys generation after generation). Yet another element is that many attorneys (and even judges in the early years of independence) were members of Parliament and therefore had other fora for discussion at their disposal.

Polarisation instead of conformism, on the other hand, has been obvious in the long struggle for Flemish emancipation, a struggle that has now become mainstream and innocent. One might say that nowadays the

⁴⁰ D. Heirbaut, M. E. Storme (Note 2), pp. 979–1041 (page 3 of the PDF version) translated by M. E. Storme, D. Heirbaut. The Belgian legal tradition: from a long quest for legal independence to a longing for dependence? Belgian report for the XVII International Congress of comparative law, Topic 1A "National legal traditions and historical backgrounds". – European Review of Private Law 2006, pp. 645–683;

⁴¹ Framework Decision of the European Council of 13 June 2002 on the European Arrest Warrant and the Surrender Process between Member States, 2002/584/JVV.

⁴² Amongst many others G. Vermeulen. U vraagt, wij draaien.; Europees aanhoudingsbevel leidt tot blinde overlevering verdachten en veroordeelden. – Juristenkrant 2002, 57, pp. 2–3; P. Bekaert. Europees aanhoudingsbevel is knoewerk op alle niveau's. – Juristenkrant 2005, 117, p. 3; P. De Hert, J. Millen. Ontvankelijkheidstoetsing en onschuldverweer bij het Europees aanhoudingsbevel. – T. Strafrecht 2006, 6, pp. 347–348; I. Wattier. Une euromesure de contrainte: le mandat d'arrêt européen. – Journ. Jur. 2002, 8, p. 4; E. Barbé. Le mandat d'arrêt européen: en tirera-t'on toutes les conséquences? – X., L'espace pénal européen; enjeux et perspectives. Bruxelles 2003, pp. 113–117.

⁴³ L. Burgelman (Note 14), p. 196.

⁴⁴ N. Luhmann. Vertrauen. Ein Mechanismus der Reduktion sozialer Komplexität. Stuttgart 1973, p. 39.

brunt of polarisation and critique is borne by the judiciary through the active use of fundamental rights *juncto* constitutional review.

Indeed, Belgium is no exception to the universal phenomenon of shifting balance between basic rights and procedural democracy, caused by the reification process if not *autopoiesis* of fundamental and human rights. In this constellation, the legality of democratic legislation is being subordinated to a 'higher' type of legitimacy, leaving only very limited possibilities for changing the structure and outcome of policies.^{*45} This year however saw the publication of a harsh critique of the European Court of Human Rights' activism in asylum matters by none less than the co-president of the Belgian Constitutional Court.^{*46} It does remain rather uncommon for a Belgian jurisconsult to lament a supra-national institution's transgression of competence...

I would like to conclude by remarking that the similarities between the Flemish/Belgian and Estonian starting points (small language and national awakening, dominating presence of a foreign legal tradition, early industrialisation, legal class that is limited in size, etc.) offer ample scope for future comparative research.

⁴⁵ C. Gearty. *Can Human Rights Survive?* Cambridge 2005; R. Bellamy. *Political Constitutionalism. A republican defence of the constitutionality of democracy.* Cambridge 2007; R. Hirschl. *Towards juristocracy. The origins and consequences of the new constitutionalism.* Cambridge (Mass.) 2004; P. Praet. *Politisierung des Rechts oder Verrechtlichung der Politik – Diskurs der Grundrechte. – Rechtstheorie* 38 (2007), Heft 2/3, pp. 367–378.

⁴⁶ M. Bossuyt. *Strasbourg et les demandeurs d'asile: des juges sur un terrain glissant.* Brusselsn 2010, 190 p.